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INSIGHT

Department of Health and Human Services Recommendation to Reschedule Marijuana: Implications for Federal Policy

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On August 29, 2023, the Department of Health and Human Services (HHS) recommended to the Drug Enforcement Administration (DEA) that marijuana be rescheduled from Schedule I to Schedule III under the Controlled Substances Act (CSA). This recommendation is based on the Food and Drug Administration's (FDA's) review of marijuana (as requested by President Biden in 2022) and related findings that are not currently available to the public. DEA has testified in response to questioning at a congressional hearing in 2020 that it is bound by FDA's recommendations on scientific and medical matters, and if past is prologue it could be likely that DEA will reschedule marijuana according to HHS's recommendation.

If marijuana is rescheduled to Schedule III, it would have broad implications for federal policy. Also, this move would have significant implications for state medical marijuana programs and users of medical marijuana, but fewer implications for state recreational marijuana programs and those who use marijuana recreationally. This Insight discusses both the potential rescheduling and select policy implications.

Rescheduling Marijuana to Schedule III

The CSA classifies various substances in one of five schedules based on their medical use, potential for abuse, and safety or risk of dependence. The five schedules are progressively ordered, with substances regarded as the least dangerous and addictive controlled in Schedule V and those considered the most dangerous and addictive controlled in Schedule I.

Marijuana as a Schedule I Controlled Substance

As described in the CSA, Schedule I substances have "a high potential for abuse" with "no currently accepted medical use in treatment in the United States" and cannot safely be dispensed under a prescription. As a Schedule I controlled substance, the CSA prohibits the manufacture, distribution, dispensation, and possession of marijuana except for federal government-approved research studies. The

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available supply of marijuana for research is subject to production quota limitations determined by DEA based on an annual assessment of need.

In 2016, FDA and DEA concluded that marijuana should remain in Schedule I.

Marijuana as a Schedule III Controlled Substance

The CSA defines a Schedule III controlled substance as having "a potential for abuse less than the drugs or other substances in schedules I and II" and "a currently accepted medical use in treatment in the United States." It also states that "[a]buse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence." A move to any lower schedule would allow for medical use of marijuana while maintaining federal criminal control over the substance pursuant to the CSA.

According to a recent report, in 2023 FDA concluded that marijuana should move to Schedule III (for more information regarding FDA's recommendation, see the article in Bloomberg News (link requires paid subscription).

Next Steps in Rescheduling Process

DEA is to conduct its own review of marijuana (a test it established in 1992 that examines the drug's chemistry, safety, and scientific evidence). If DEA opts to move forward with rescheduling marijuana to Schedule III, it would do so through the rulemaking process. CRS is unaware of any instance where DEA has rejected an FDA recommendation to reschedule. As a comparative example, in September 1998 FDA recommended to DEA that Marinol be rescheduled to Schedule III, and in July 1999 DEA rescheduled Marinol to Schedule III.

Potential Implications of a Move to Schedule III

A change to Schedule III would mark a major shift in the federal government's policy on marijuana. For over 50 years, marijuana has remained on Schedule I. Violations of CSA law involving marijuana have resulted in criminal sanctions for thousands of offenders. There are many federal policy implications of such a shift, particularly because most states now have comprehensive medical marijuana programs. The following are selected federal policy implications if marijuana were to be rescheduled:

- Those who manufacture, distribute, dispense, and possess medical marijuana may now be able to do so lawfully (under the CSA).
- States' medical marijuana programs may now be able to comply with the CSA, and will still be subject to CSA/DEA criminal and regulatory control, federal public health laws such as the Federal Food, Drug, and Cosmetic Act, and agricultural laws such as the Agricultural Marketing Act of 1946.
- The scope of and demand for FDA oversight for medical marijuana and related products may grow considerably. In the short term, FDA may need to generate or update a substantial amount of technical information to clarify its regulatory approach to marijuana for relevant stakeholders. Given that marijuana is a complex substance containing various pharmaceutical components and is available to consumers in numerous formats, FDA may also need to consider long-term resource allocation to ensure that marijuana products consistently meet applicable regulatory standards.
- Marijuana producers and retailers would be able to deduct the costs of selling their product (e.g., payroll, rent, advertising) for the purposes of federal income tax filings.
- Those who use medical marijuana lawfully may now be eligible to (1) access public housing, (2) obtain immigrant and nonimmigrant visas, and (3)

- purchase and possess firearms. Those who use marijuana recreationally would still face restrictions in these areas.
- Researchers would face less strict regulatory controls in researching marijuana as a Schedule III controlled substance, which may in turn promote further research on marijuana.
- DEA would no longer set production quota limitations for marijuana.
- Those who use medical marijuana lawfully may contend with fewer barriers to federal employment and eligibility to serve in the military.

Considerations for Congress

Congress may choose to address any number of issues related to the potential rescheduling of marijuana. First, Congress could take legislative action to keep marijuana on or remove marijuana from Schedule I. If Congress removed marijuana from Schedule I, it might (1) place marijuana on one of the other schedules of controlled substances, (2) create another schedule or separate classification for marijuana under the CSA, or (3) remove marijuana as a controlled substance altogether. If the administrative scheduling process moves forward, Congress may consider whether to devote additional resources to FDA and the U.S. Department of Agriculture (USDA) to ensure the safety and quality of the many different products already available in many state markets.

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